Cheong Kee Lai Sdn Bhd v Atlas Corporation Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO SI–22–519 OF 2001
AZMEL MAAMOR J
23 OCTOBER 2003

Contract — Sale and purchase of land — Sale and purchase agreeemnt — Terms — Non-delivery of strata title or disclaimer of right/interest upon settlement of purchase price — Whether purchaser entitled to seek specific performance of terms in agreement — Guaranteed Rental Return Agreement — Option available under agreement — Whether purchaser required to exercise option in light of actions pursued by vendor

The plaintiff entered into a sale and purchase agreement with the defendant to purchase an office unit from them. The agreement stipulated that upon settlement of the full purchase price, the defendant was obliged to deliver to the plaintiff an individual strata title of the said property or a disclaimer from the bank or the financial institution to which the property was charged to. When the defendant failed to deliver the strata title, the plaintiff requested the issuance of the disclaimer but the defendant refused to comply.

In addition to the first agreement, the plaintiff and defendant had also entered into another agreement, ie the Guaranteed Rental Return Agreement (GRRA), under which the plaintiff was given the option of handing back possession of the said property to the defendant and appoint the defendant as manager of the said property. Under this scheme, the defendant had to pay the plaintiff 10% of the purchase price each year for a period of six years. The defendant should have paid the plaintiff RM27,401.50 by May 2001 but had only paid RM4,016.46.

The plaintiff brought an action against the defendant pursuant to O 81 Rules of High Court 1980 for the following claims: (1) seeking specific performance compelling the defendant to procure and deliver to the plaintiff a disclaimer of rights, interest from the bank or financial institution; and (2) a sum of RM23,385.04 arising from the provisions of the GRRA. The defendant raised a preliminary objection regarding the plaintiff's second claim in that it was inappropriate for the plaintiff to claim specific performance under O 81 of the Rules of the High Court 1980.

Held, allowing the application:

(1) The defendant's claim, that it had decided to opt to give the strata title instead of a disclaimer, was unacceptable because at the time the purchase price was fully paid the individual strata title to the said property was not available to be issued to the plaintiff. The option to issue the disclaimer was provided to cater for a situation where the defendant could not issue the individual strata title to the said property (see para 7).

(2) In light of the admission and payments made by the defendant to the plaintiff, the defendant should be estopped from arguing that the plaintiff had not exercised its option under the GRRA (see para 12).

(3) There is no merit in the preliminary objection raised by the defendant that it is inappropriate for the plaintiff to claim under O 81 for the second claim since it was not in the nature of a specific performance. Since it was only a procedural requirement, judicial discretion was used to waive

the procedural requirement in order to enable both claims to be heard together and expedite the conclusion of such action (see para 13).

[**Bahasa Malaysia summary**

Plaintif telah membuat satu perjanjian jual-beli dengan defendan untuk membeli sebuah unit pejabat ('harta tersebut') daripadanya. Perjanjian tersebut memperuntukkan bahawa selepas harga belian disempurnakan, defendan harus menyampaikan hakmilik strata persendirian kepada plaintif, atau suatu penolak tuntutan dari pihak bank atau institusi kewangan di mana harta tersebut digadaikan. Apabila defendan gagal menyampaikan hakmilik strata persendirian, plaintif memohon untuk penyampaian penolak tuntutan daripada bank tetapi defendan enggan berbuat demikian. Berikutan perjanjian pertama, plaintif dan defendan telah membuat suatu lagi perjanjian iaitu Perjanjian Pemulangan Sewa Terjamin (PPST), dalam mana plaintif diberikan opsyen untuk mengembalikan milikan harta tersebut kepada defendan serta memilih defendan sebagai pengurus harta. Di bawah skim berkenaan, defendan harus membayar 10% daripada harga belian kepada plaintif untuk tempoh enam tahun. Oleh yang demikian, defendan seharusnya membayar plaintif sebanyak RM27,401.50 menjelang Mei 2001 tetapi hanya RM4,016.46 telah dibayar.

Justeru itu, plaintif memulakan tindakan undang-undang terhadap defendan menurut A 81 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') dan tuntutannya adalah berikut: (1) perlaksanaan spesifik untuk memaksa defendan mendapatkan dan menyampaikan kepada plaintif penolak tuntutan hak dari bank atau institut kewangan; dan (2) baki sebanyak RM23,385.00 berdasarkan PPST. Pihak defendan telah mengutarakan suatu bantahan awal terhadap tuntutan kedua plaintif iaitu ketidaksesuaian menuntut pelaksanaan spesifik di bawah A 81 KMT.

Diputuskan, membenarkan permohonan tersebut;

(1) Tuntutan defendan, bahawa mereka telah memilih untuk memberikan hakmilik strata dan bukannya penolak tuntutan, tidak terpakai kerana pada masa harga belian diselesaikan, hakmilik strata persendirian tidak wujud untuk diserahkan kepada plaintif. Opsyen untuk menyampaikan penolak tuntutan disediakan bagi keadaan di mana defendan tidak dapat menyerahkan hakmilik strata persendirian hartanah berkenaan (lihat perenggan 7).

(2) Dengan kewujudan pengakuan dan bayaran yang dibuat oleh defendan kepada plaintif, defendan seharusnya diestop daripada mengadu bahawa plaintif tidak menggunapakai opsyennya di bawah PPST (lihat perenggan 12).

(3) Bantahan permulaan yang dikemukakan oleh pihak defendan, bahawa tidak sesuai bagi pihak plaintif menuntut di bawah Aturan 81 untuk tuntutan kedua sebab tuntutan tersebut tidak bersifatkan perlaksanaan spesifik, tidak mempunyai sebarang merit. Oleh kerana ia hanya suatu keperluan prosedur, budi bicara mahkamah digunakan untuk menepikan keperluan prosedur tersebut supaya kedua-dua tuntutan boleh dibicarakan serentak tanpa membuang masa (lihat perenggan 13).]

Notes

For cases on sale and purchase agreements for sale and purchase of property, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 4318.

Legislation referred to

Rules of the High Court 1980 O 81

Augustine Poh (Cheong Kee Fong & Co) for the plaintiff.
Ekhwan bin Abdul Rasid (Rastam Singa & Co) for the defendant.

Azmel Maamor J:

[1] On 20 December 1995 the two parties in this case had entered into a sale and purchase agreement whereby the plaintiff agreed to purchase from the defendant a piece of property namely, an office unit described as Suite No. 702, Tower A and now known as Suite No. A-7-7, Menara Atlas, Plaza Pantai ('the said property') at the price of RM274,015.03. Construction of the said property had been completed and the purchase price had been fully paid. However, the individual strata title of the said property had not been issued by the defendant to the plaintiff. Section 13.01 of the said agreement reads:

> The Purchaser hereby irrevocably grants the Purchaser's consent and approved to the Vendor to charge the said Land and/or the Shop office Project as often as the Vendor may require in favour of such bank(s) and/or financial institution(s) as security or additional security for such amount or amounts with interest thereon and on such terms and conditions as the Vendor may in its absolute discretion deem fit for the purpose of or incidental to the financing of the Shopoffice Project provided always the Vendor shall be responsible to deliver a separate strata title to the suite free from any encumbrances and/or procure from such bank or financial institution to which the said Land is charged a disclaimer of the bank's or financial institution's lieu, rights, title or interests in the Suite upon payment of the full purchase price of the Suite by the Purchaser and upon such event the Vendor hereby covenants with the Purchaser not to further charge the said Land, save and except all those suites/shops/part of the Shopoffice Project which the Vendor has not sold and is still the owner of the same, in favour of any bank and/or financial institution(s) as further security. Nothing herein shall make the Vendor responsible or liable for any conditions or restrictions that the Appropriate Authority or any relevant authority may impose against the said Land, the shophouse Project and/or the Suite or any charge lieu or any encumbrances whatsoever that may arise as a result of any act agreement or transactions entered into by the Purchaser with any body bank or financial institution party or persons whether a body corporate or not.

[2] In essence, what s 13.01 stated was that upon full payment of the purchase price by the plaintiff, the defendant would be obliged to deliver to the plaintiff either:

(1) an individual strata title of the said property; or

(2) a disclaimer from the bank or financial institution to which the said Land was charged.

[3] It was an undisputed fact that the individual strata title had not been issued. Such being the situation the plaintiff requested from the defendant the issuance of the said disclaimer from the bank or financial institution in accordance with s 13.01 of the said Agreement. However, the defendant refused to comply.

[4] In this case the plaintiff brought action against the defendant under O 81 of the Rules of the High Court 1980, seeking for specific performance compelling the defendant to procure and deliver to the plaintiff a disclaimer of rights, interests from the banks and/or financial institution in respect of the said property in accordance with s 13.01 of the said Agreement.

[5] In addition to that the plaintiff also made a claim in the sum of RM23,385.04 from the defendant. This claim was based on the Guaranteed Rental Return Agreement dated 20 December 1995 ('GRRA'). Under this GRRA the plaintiff was given the option of handing back possession of the said property to the defendant and appointing the defendant as the manager of the said property. Under the scheme the defendant would have to pay the plaintiff 10% of purchase price each year for a period of 6 years. It was contended by the plaintiff that as of May 2001 the plaintiff should have received the sum of RM27,401.50 from the defendant. However, the defendant only paid the plaintiff a sum of RM4,016.46. The plaintiff therefore sought for the remaining balance sum of RM23,385.04.

[6] I shall first deal with the first part of the plaintiff's claim ie the application for specific performance to compel the defendant to procure to the plaintiff a disclaimer of rights and interests from the bank or financial institution to which the said Land was charged. Needless to say, this issue would only require the interpretation of s 13.01 of the said Agreement. In my view the wordings of s 13.01 are very clear. In order for the plaintiff to succeed in its claim the following two requirements had to be fulfilled, namely:

(1) that the purchase price had been fully paid, and

(2) that at the time the purchase price had been fully paid the individual strata title had not been issued.

[7] From the evidence adduced it was an undisputed fact that the purchase price had been fully paid by the plaintiff to the defendant. Likewise it was an agreed fact that the individual strata title of the said property had not been issued. Therefore in the absence of the strata title it would be incumbent upon the defendant to issue the required disclaimer as required under s 13.01 to the plaintiff. In my view the defendant's claim that it had decided to opt to give the strata title instead of a disclaimer would hold no water because at the time the purchase price was fully paid the individual strata title to the said property was not available to be issued to the plaintiff. The option to issue the disclaimer was provided to cater for a situation where the defendant could not issue the individual strata title to the said property.

[8] In the circumstances and for the reasons as I have stated above I allowed the first part of the plaintiff's application.

[9] I shall now deal with the second part of the plaintiff's application ie claiming for the sum of RM23,385.04 arising from the provisions of the GRRA. Under the provisions of the GRRA the plaintiff had the option of handing back possession of the said property to the defendant and appointing the defendant as the manager of the said property and the defendant would have to pay the plaintiff 10% of the purchase price each year for a period of six years. In this case the six-year period commenced on 1 May 2000. And by May 2001 the defendant should have paid the plaintiff a sum of

RM27,401.50. However the defendant only paid the plaintiff the sum of RM4,016.46 thereby leaving a balance of RM23,385.64 which became the subject matter of the second part of the plaintiff's application.

[10] In its defence the defendant contended that the plaintiff had no basis to make this claim because the plaintiff had not exercised its option as required under the provision of the GRRA. In my view there is no merit in this defendant's contention because the defendant had already made payments to the plaintiff for such rental as clearly indicated in the defendant's letter to the plaintiff dated 29 May 2000 and 27 June 2000. (See exhs CKL8 and CKL9 in encl 5). In the letter dated 29 May 2000 the defendant made payment amounting to 'RM2,266 being the Guaranteed Rental Return payable for May 2000'. And in the letter dated 27 June 2000 the defendant paid the plaintiff 'the sum of RM1,750.46 being the Guaranteed Rental Return for the month of June 2000'. With such clear admission and payment made to the plaintiff, the defendant could not now argue that the plaintiff had not exercised its option. In the presence of such letters the defendant should be estopped from arguing that the plaintiff had not exercised its option. I was satisfied that the defendant had no valid defence.

[11] In the light of such circumstances I also allowed the second part of the plaintiff's application. I also allowed the plaintiff to claim for costs in respect of its claim against the defendant.

[12] It must also be mentioned that the defendant at the commencement of its argument in respect of the second part of the plaintiff's application, raised a preliminary objection in that it was inappropriate for the plaintiff to make the claim under O 81 of the Rules of the High Court 1980 since the claim for the sum of RM23,385.04 was not in the nature of a specific performance.

[13] I do not think there was much merit in the issue raised by the defendant. I was of the view that the plaintiff had quite rightly invoked O 81 when it applied for the first part of its claim, which was in the nature of a specific performance. There is nothing from the wordings of O 81 which prohibits any other parts of the applicant's claim to be applied together with the claim for specific performance. Therefore anything that is not specifically prohibited is allowed. In my opinion it would cause great inconvenience to separate the claim for the specific performance from a non-specific performance claim. To have them heard separately would be a waste of time especially if both claims arise from the same transaction. After all this is only a procedural requirement. It would certainly cause no injustice to the defendant to have the entire applications heard at the same time. If such needs were to arise I would not hesitate to exercise my discretionary powers to waive such procedural requirement in order to enable both claims to be heard together and expedite the conclusion of such action. In the light of such circumstances I dismissed the defendant's preliminary objection.

Application allowed.

Reported by Jeyanthi Mala